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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
MARC SPITZER
Commissioner
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

2006 JAN 23 P 3: 08

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE FORMAL COMPLAINT OF PAC-WEST TELECOMM SEEKING ENFORCEMENT OF THE INTERCONNECTION AGREEMENT BETWEEN PAC-WEST TELECOMM AND QWEST CORPORATION.

DOCKET NO. T-01051B-05-0495
T-03693A-05-0495

QWEST CORPORATION'S NOTICE OF THIRD FILING OF SUPPLEMENTAL AUTHORITY

Qwest Corporation ("Qwest") hereby files as supplemental authority the State of Minnesota Office of Administrative Hearing for the Public Utilities Recommendation on Motions for Summary Disposition No. 3-2500-16646-2, P-421/C-05-721, *In the Matter of the Complaint of Level 3 Communications, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic*, issued January 18, 2006 (the "Recommendation"). The Recommendation is attached hereto.

In particular, Qwest would like to draw the Commission's attention to the following passages from the Recommended Decision:

> VNXX routing is an issue with tremendous policy and financial implications, not limited to its impact on ISP-bound traffic. It changes one of the fundamental assumptions upon which the Act and most existing regulation of telephone carriers is premised, which is that there is a distinction between local service and long-distance service and that the compensation regimes for the two types of service are different. Today's technology may render these distinctions less

meaningful, as Level 3's argument suggests, but the compensation regime has not yet caught up with the technology. The ALJ has difficulty accepting the proposition, advanced by Level 3, that the FCC would have endorsed such a fundamental change in approach without mentioning it at all. *(Order at p. 10.)*

The distinction between ISP-bound FX traffic and VNXX traffic could be important in determining whether some form of termination compensation is due, whether under the reciprocal compensation provisions of § 251(b) or the hybrid regime for ISP traffic. For example, Qwest offers a service called FX, which permits a customer to purchase a connection in the local calling area associated with a telephone number, for which it pays the local exchange rate, as well as a private line transport to wherever its equipment is located. The customer who receives the calls pays for the dedicated transport, not the calling party. Qwest maintains that it requires its ISP customers to use the same arrangement and to pay full retail rates for the private line. Because the private line terminates in the same local calling area as the assigned NPA/NXX, Qwest considers that call to be local. As described by the parties, VNXX routing achieves the functionality of FX service, but no one pays anything (access charges or dedicated transport) for traffic that crosses local calling areas and would otherwise be considered toll traffic. The ALJ cannot assume on this record that VNXX and FX traffic are the same thing. *(Order at p. 12.)*

RESPECTFULLY SUBMITTED this 23rd day of January, 2006.

By ______________________
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3-2500-16646-2
P-421/C-05-721

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of Level 3 Communcations, LLC, Against Qwest Corporation Regarding Compensation for ISP-Bound Traffic	**RECOMMENDATION ON MOTIONS FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Kathleen D. Sheehy on cross-motions for summary disposition filed by Level 3 and Qwest. The OAH record closed on December 23, 2005, upon receipt of the last letter submission by Level 3.

Gregory R. Merz, Esq., Gray Plant Mooty, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-3796, appeared on behalf of Level 3 Communications, LLC (Level 3). Jason D. Topp, Corporate Counsel, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest. Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce (Department).

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED:

1. That Level 3's Motion for Summary Disposition on Count I of its Complaint be DENIED, and that its Motion for Summary Disposition on Qwest's Counterclaims be GRANTED in part and DENIED in part, as more fully described below; and

2. That Qwest's Motion for Summary Disposition on all counts of Level 3's Complaint and on its Counterclaims be GRANTED in part and DENIED in part, as more fully described below; and

3. That there is no need for an evidentiary hearing.

Dated this 18th day of January, 2006.

s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, any party adversely affected by this Report, may file exceptions to it within 20 days of the mailing date hereof. Exceptions should be filed with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 - 7th Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply. An original and 15 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions, or after oral argument, if held. Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that the recommendation has no legal effect unless expressly adopted by the Commission as its final order.

MEMORANDUM

I. Background

Level 3 is a Delaware limited liability company that provides wholesale dial-up services to internet service providers (ISPs). The PUC has authorized it to provide competitive local exchange service in Minnesota pursuant to Minn. Stat. § 237.16. Level 3's software-based switching and routing facilities are located in Minneapolis. Qwest is an incumbent local exchange carrier (ILEC) authorized to provide local exchange service and intrastate interexchange service in Minnesota.

On April 20, 2001, the Commission approved an interconnection agreement (ICA) between Level 3 and Qwest. The parties currently exchange traffic pursuant to an ICA the Commission approved on March 3, 2003. Before the last agreement was approved, Level 3 and Qwest submitted one issue for arbitration: whether traffic originating on Qwest's side of the network, which is bound for ISPs served by Level 3, should be included or excluded from the relative use calculation used to determine the appropriate charges for interconnection facilities (direct trunk transport and entrance facilities). After arbitration, the Commission concluded that this traffic should not be excluded from the relative use calculation because Qwest remained responsible for these interconnection costs.[1]

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[1] *In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Communications*, MPUC P-5733,421/IC-02-1372, Order Resolving Arbitration Issues (December 23, 2002) (*Level 3/Qwest Arbitration Order*).

With regard to the separate issue of call termination and delivery costs, the ICA provides that the parties agree to "exchange all EAS/Local (§ 251(b)(5)) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC ordered rate, pursuant to the FCC ISP Order."[2] As agreed by the parties and as required by the *ISP Remand Order*, bill-and-keep (as opposed to reciprocal compensation) applied to call termination and delivery costs at the time the ICA was approved, because Qwest and Level 3 exchanged no traffic before the date of the Order.[3] This provision was required by what the FCC called its "new market restriction" on reciprocal compensation.[4]

At some point prior to September 23, 2004, Qwest became aware that Level 3 was assigning NPA/NXX numbers to customers outside of the local calling areas to which those numbers corresponded. Level 3 indicated that it had a business practice of setting up such arrangements with ISPs.[5] The North American Numbering Plan provides for telephone numbers consisting of a three-digit area code (known as the numbering plan area or NPA), a three-digit prefix (NXX), and a four-digit line number. NXX codes are assigned to particular central offices or rate centers within the state and are associated with specific geographic areas or exchanges. Carriers in Minnesota have historically used, and continue to use, the NPA/NXXs of the calling and called parties to determine whether a call is rated as a local or as a toll call and whether reciprocal compensation or switched access charges apply to the call. Until recently, NPA/NXXs have been the appropriate way to determine local/toll compensation largely because they have been presumed by the industry to align with the geographic calling and called areas. A virtual NXX (VNXX) service occurs when a competitive carrier assigns an NPA/NXX to a customer physically located outside of the rate center or exchange with which that NPA/NXX is associated. [6]

Qwest objected to Level 3's practice, maintaining VNXX traffic was not authorized by the ICA. Qwest offered to provide the requested service pursuant to an interim amendment to the ICA, under which Qwest would provision the service on LIS facilities, as requested by Level 3, pending the outcome of dispute resolution proceedings, as long as Level 3 agreed to reconfigure its network interconnection and/or financially true-up the difference between LIS compensation amounts and any

[2] ICA § 7.3.4.3; *see also* §§ 7.3.6.1, 7.3.6.2.5. The "FCC ISP Order" referenced in the ICA is the *ISP Remand Order*.
[3] Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. Nos. 96-98 & 99-68, FCC-01-131 (rel. Apr. 27, 2001) (*ISP Remand Order*).
[4] *ISP Remand Order* ¶ 81. The *ISP Remand Order* contained other provisions, applicable to parties that were exchanging traffic as of the date of the Order, which gradually reduced the amount of reciprocal compensation paid from $0.0015 to $0.0007 per minute over time and capped the growth of traffic eligible for compensation. *Id.* ¶¶ 78, 86.
[5] Level 3 Complaint, Ex. D.
[6] *See In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442,421/IC-03-759, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 11-14 (Nov. 18, 2003) (*AT&T/Qwest Arbitration Order*).

higher amount Qwest might be entitled to as a result of the dispute resolution.[7] Level 3 did not sign the proposed interim agreement on VNXX traffic.

On October 18, 2004, the FCC issued its *Core Forebearance Order*, which lifted the "new market restriction" and the growth cap restriction.[8] Qwest agrees that the effect of the *Core Forebearance Order* is that Level 3 became eligible to receive compensation for terminating Qwest-originated "ISP-bound traffic." The issue presented in this case is whether "ISP-bound traffic" includes VNXX traffic.

On December 13, 2004, Level 3 contacted Qwest and proposed to commence negotiating an amendment of the ICA to reflect the terms of the *Core Forbearance Order*. Level 3 immediately began billing Qwest for all ISP-bound traffic exchanged in Minnesota, including VNXX traffic, estimating that termination compensation would amount to approximately $1.5 million per year.[9]

On January 27, 2005, Qwest wrote to Level 3 notifying Level 3 that it was initiating a dispute pursuant to the dispute resolution provisions of the ICA concerning Level 3's use of LIS trunks to exchange VNXX traffic, on the basis that the ICA did not authorize the use of LIS trunks for traffic other than local or "ISP-bound traffic" as that term is used in the *ISP Remand Order*. Qwest gave Level 3 the option of changing the assignment of telephone numbers for Level 3 customers, to ensure the telephone number was assigned to the rate center where the customer was physically located, or migrating traffic from LIS to tariffed switched access Feature Group D trunks for interLATA traffic where appropriate. Qwest declined to make any reciprocal compensation payments for VNXX traffic.[10]

On March 31, 2005, Level 3 demanded that Qwest update all ICAs pursuant to the change in law provisions and proposed an amendment to reflect the substance of the *Core Forebearance Order*.[11] Level 3's proposed amendment does not specifically address the issue of how VNXX traffic is to be treated. Qwest has refused to agree to an amendment that does not exclude VNXX traffic from the definition of "ISP-bound traffic."

On May 9, 2005, Level 3 filed a Complaint with the PUC, alleging that Qwest breached its obligation under the ICA and Minn. Stat. §§ 237.12 and 237.121 to pay reciprocal compensation for Level 3's ISP-bound traffic pursuant to the *Core Forebearance Order* (Count I); that Qwest failed to negotiate in good faith an amendment reflecting the FCC's *Core Forebearance Order,* in violation of the ICA and state law (Count II); and that Qwest's failure to compensate Level 3 for ISP-bound traffic since the date of the *Core Forebearance Order* and its refusal to negotiate in good faith

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[7] Level 3 Complaint, Ex. D.

[8] *Petition of Core Communications, Inc., for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, FCC 04-241, WC Docket No. 03-171 (rel. Oct. 18, 2004) (*Core Forbearance Order*).

[9] Level 3 Complaint, Ex. A.

[10] Level 3 Complaint, Ex. B.

[11] Level 3 Complaint, Ex. C.

an amendment to the ICA constituted discriminatory conduct and failure to interconnect on reasonable terms and conditions; and that this conduct has impaired the speed quality, and efficiency of Level 3's products and constitutes a refusal to provide a service, product or facility to a telephone company or telecommunications carrier in violation of state and federal law, the parties' agreement, and the Commission's order adopting the agreement. In its request for relief, Level 3 sought, among other things, a declaration that the ICA, as interpreted in accordance with applicable law, requires Qwest to compensate Level 3 for Level 3's transport of ISP-bound traffic; an order requiring Qwest to pay all past due reciprocal compensation charges, with late payment charges on all past due amounts; an order approving Level 3's proposed amendment concerning the *Core Forebearance Order* and requiring the parties to true-up all billing related to their exchange of ISP-bound traffic back to October 8, 2004, the effective date of the Order; penalties and fines pursuant to Minn. Stat. § 237.461 and 237.462; and an award of attorney's fees.

On May 23, 2005, Qwest filed an Answer and Counterclaim, denying that non-local traffic bound for an ISP is "ISP bound traffic" as defined in the ICA and proposing an amendment that incorporates the compensation provisions of the *Core Forebearance Order* but excludes VNXX traffic. In addition, Qwest maintained that it is not obligated to pay reciprocal compensation until the ICA is amended to reflect the change in law, and that Level 3 has improperly billed Qwest for reciprocal compensation before the ICA would permit it.

Qwest also asserted a counterclaim against Level 3, alleging that Level violated the change of law provision in the ICA by billing Qwest for traffic that is not covered by the *Core Forebearance Order* (Count I); that Level 3 has breached its obligation under § 13.4 of the ICA to administer the NXX codes assigned to it and to provide "all required information regarding its network for maintaining the LERG in a timely manner" (Count 2); and that Level 3 has violated the ICA by routing VNXX traffic over LIS trunks (Count 3). In its request for relief, Qwest requested denial of Level 3's requests for relief; an order prohibiting Level 3 from assigning NPA-NXX in geographic locations other than where their ISP equipment is located and directing Level 3 to follow the change of law procedures in the ICA to implement the *Core Forebearance Order;* and the imposition of penalties pursuant to Minn. Stat. § 237.462.

In its Order referring this matter to OAH, the Commission denied Level 3's petition for temporary relief on the basis that the parties' ICA requires Qwest to obtain the Commission's approval before discontinuing any service.[12]

The prehearing conference took place as scheduled on July 25, 2005. The parties submitted prefiled testimony on the schedule as set forth in the First Prehearing Order.[13] On September 27, 2005, Level 3 and Qwest jointly requested a continuance of the prehearing deadlines for filing dispositive motions and the hearing date, so that they

[12] Order Asserting Jurisdiction, Denying Request for Temporary Relief, and Referring Matter to Office of Administrative Hearings, June 3, 2005.
[13] First Prehearing Order, August 1, 2005.

could continue their efforts to negotiate a resolution of these issues. The Department did not object to the continuance. Those dates were extended, and the hearing was rescheduled for January 17, 2006.[14] When the cross-motions for summary disposition were filed, it appeared to the Administrative Law Judge that the parties agreed that there were no factual issues requiring an evidentiary hearing and that the legal issues presented were appropriate for summary disposition. The hearing date was continued indefinitely pending a recommendation on the cross motions for summary disposition.[15]

Level 3 seeks summary disposition on the basis that its proposal to amend the ICA accurately reflects the change of law resulting from the *Core Forebearance Order* and directing that its proposed amendment be incorporated into the ICA. It seeks an order that Qwest is obligated to compensate Level 3 for "all locally dialed ISP-bound traffic" originated by Qwest customers to be terminated to Level 3 customers, and requiring Qwest to make such payments retroactively to October 8, 2004, the effective date of the *Core Forebearance Order.* Level 3 also seeks dismissal of Qwest's counterclaims.

Qwest seeks summary disposition on all claims asserted by Level 3 and on all of its counterclaims. Qwest seeks an order denying the relief requested by Level 3, declaring that Level 3's bills to Qwest are invalid, and ordering Level 3 to cease using VNXX numbers. Alternatively, if VNXX numbering is proper, Qwest seeks a declaration that no intercarrier compensation is due for calls to those numbers.

II. Standard for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[16] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.[17]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.[18]

In this case, the facts are set forth in the documents filed by the parties in support of their motions. Although the parties do not assert that there are facts in dispute, if

[14] Second Prehearing Order, October 5, 2005.
[15] Third Prehearing Order, January 5, 2006.
[16] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.
[17] *See* Minn. R. 1400.6600.
[18] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[19]

III. DISCUSSION

The main issue in this case is whether Qwest's obligation to pay reciprocal compensation for "ISP-bound traffic" includes VNXX traffic. For the purposes of this case, "VNXX-routed ISP-bound traffic" means a situation in which Level 3 assigns one or more NPA/NXX numbers to an ISP customer, even though the ISP has no physical presence (modem banks or server) in the local calling area associated with that number. ISP-bound traffic directed to those numbers is routed to Level 3's Point of Interconnection (POI) and then delivered to the ISP's modem bank or server at a physical location in another local calling area.[20]

Level 3 maintains that the *ISP Remand Order*, read in conjunction with the *Core Forebearance Order*, requires that reciprocal compensation be paid for *all* ISP-bound traffic, including VNXX-routed ISP-bound traffic. Qwest maintains that the *ISP Remand Order* addresses ISP-bound traffic only in those circumstances in which the ISP is physically located in the same local calling area as the end-user customer initiating the call.[21] Qwest maintains that VNXX-routed ISP-bound traffic is really toll traffic, which Level 3 has attempted to disguise through misuse of NPA/NXX numbers.

Applicable Law

Determining the applicable law on this issue requires a somewhat lengthy description of the FCC's continuing efforts to rationalize its treatment of ISP-bound traffic under the Telecommunications Act of 1996. Pursuant to 47 U.S.C. § 251(a)(1), a local exchange carrier has an obligation to interconnect directly or indirectly with the facilities of other telecommunications carriers. It is this obligation that ensures that the customers of one carrier will be able to make calls to, and receive calls from the customers of another carrier. Pursuant to 47 U.S.C. § 251(b)(5), a carrier has an obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

In its 1996 *Local Competition Order*, the FCC found that Section 251(b)(5) reciprocal compensation obligations "apply only to traffic that originates and terminates within a local area as defined by the state commissions."[22] "Termination" of traffic was

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[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

[20] Qwest has estimated that about 13% of Level 3's traffic is VNXX-routed ISP-bound traffic. *See* Direct Testimony of Larry Brotherson at 17. Level 3's estimate is significantly higher. The parties agree that this fact issue is not material for purposes of their summary disposition motions.

[21] Qwest calls this "local" ISP-bound traffic.

[22] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd 15499 at ¶ 1034 (1996) (emphasis added) (*Local Competition Order*), *aff'd in part, vacated in part sub nom. Competitiive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 744 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *on remand,*

defined as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises."[23]

In its *ISP Declaratory Order*, the FCC described two potential sources of compensation for ISP-bound calls: access revenues, paid when two local exchange carriers collaborate to provide a long-distance call by delivery to an interexchange carrier; and reciprocal compensation, paid when two carriers collaborate to complete a local call.[24] The FCC concluded, by applying its "end-to-end" jurisdictional analysis, that ISP-bound traffic is substantially interstate in nature and thus is "nonlocal"; however, access charges were not an available revenue source because of its previous decision to exempt ISPs from access charges by treating ISPs as end users, rather than long-distance carriers. The FCC left it to state commissions to determine whether reciprocal compensation was appropriate for ISP-bound traffic. The FCC's description of ISP traffic in the *ISP Declaratory Order* is as follows: "[u]nder one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server *in the same local calling area."* No other arrangements, typical or atypical, are described in the Order. The FCC also described ISP traffic as flowing from an originating caller, carried by the ILEC to the point of interconnection (POI) with the CLEC serving the ISP; and carried by the CLEC from the POI to "the ISP's local server," and from the ISP's local server to a computer that connects the call to the Internet.[25]

On appeal, the D.C. Circuit Court of Appeals described the ruling under review as the FCC's consideration of "*whether calls to internet service providers ('ISPs') within the caller's local calling area are themselves local.*'"[26] The Court held that the FCC had failed to explain why the jurisdictional analysis was relevant to deciding whether reciprocal compensation rules apply to ISP traffic under the 1996 Act. The D.C. Circuit vacated and remanded the Order.

In the *ISP Remand Order*, the FCC again reached the conclusion that the compensation between two LECs involved in delivering ISP-bound traffic should not be governed by the reciprocal compensation provisions of § 251(b)(5). This decision rested on its conclusion that ISP-bound traffic is "information access" under 47 U.S.C. § 251(g), which the FCC interpreted as a "carve-out" provision exempting this traffic from reciprocal compensation obligations under § 251(b). The *ISP Remand Order* contains essentially the same description of ISP traffic as in the *ISP Declaratory Order:* "[A]n ISP's end-user customers typically access the Internet through an ISP server located *in the same local calling area.* Customers generally pay their LEC a flat monthly fee for

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Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), *reversed in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[23] 47 C.F.R. § 51.701(d).

[24] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 at ¶ 9 (1999) (*ISP Declaratory Order*), *vacated and remanded sub.nom. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1-2, 5, 8 (D.C. Cir. 2000).

[25] *ISP Declaratory Order* ¶ 4 (emphasis added); *id.* ¶ 7.

[26] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1-2 (D.C. Cir. 2000) (emphasis added). *See also id.* (an end user "will use a computer and modem to place a call to the ISP server in his local calling area").

use of the local exchange network, including connections to their *local ISP*."[27] No other scenarios are described.

The FCC discussed at length the market distortions and regulatory arbitrage opportunities created by requiring per-minute reciprocal compensation rates for ISP-bound traffic, which is essentially one-way traffic from the ILEC customer to the CLEC serving the ISP. Although it concluded that ISP-bound traffic was not subject to reciprocal compensation, the FCC created a "hybrid" cost-recovery mechanism for this traffic that included low per-minute rates with a cap on the total volume of traffic, and a "new market restriction" limiting compensation to carriers who were exchanging traffic before April 18, 2001.[28] This mechanism was described as an "interim regime" pending the FCC's resolution of a rule-making docket opened the same day, intended to begin a fundamental re-examination of all currently regulated forms of intercarrier compensation.[29] More specifically, the Order provides that "[t]he interim regime we establish here will govern intercarrier compensation for ISP-bound traffic until we have resolved the issues raised in the intercarrier compensation NPRM."[30] Because this mechanism was adopted pursuant to the FCC's authority under § 201, as opposed to § 252, the FCC determined that state commissions no longer had authority to address intercarrier compensation issues for ISP-bound traffic.[31] The FCC modified its definition of telecommunications traffic to exclude exchange access, information access, and exchange access for such services.[32]

On appeal, the D.C. Circuit again described the *ISP Remand Order* as holding that "under § 251(g) of the Act [the FCC] was authorized to "carve out" from § 251(b)(5) calls made to internet service providers ('ISPs') *located within the caller's local calling area*." [33] The Court held that § 251(g) provides no basis for the Commission's action, and remanded but did not vacate the Order. [34] Accordingly, the interim rules adopted in the *ISP Remand Order* remain in effect. The FCC has not completed the remand proceedings required by *Worldcom*, nor has it issued new rules in the *Intercarrier Compensation NRPM*. The *Core Forebearance Order* contains no further articulation of the meaning of ISP-bound traffic.

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[27] *ISP Remand Order* at ¶ 10 (emphasis added). *See also id.* at ¶ 12 (as a result of interconnection and growing local competition, more than one LEC may be involved in the delivery of telecommunications *within a local service area*) (emphasis added); ¶ 13 (the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to "*an ISP in the same local calling area* that is served by a competing LEC") (emphasis added).
[28] *ISP Remand Order* at ¶¶ 77-94.
[29] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*); *see also In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking (Mar. 3, 2005).
[30] *ISP Remand Order* ¶ 77.
[31] *ISP Remand Order* ¶ 82.
[32] 47 C.F.R. § 51.701(b).
[33] *Worldcom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003) (emphasis added). *See also id.* ("The reciprocal compensation requirement of § 251(b)(5) . . . is aimed at assuring compensation for the LEC that completes a call *originating within the same area*.") (emphasis added).
[34] *WorldCom, Inc. v. FCC*, 288 F.3d at 430 (emphasis added).

If the issue is simply whether the FCC included VNXX traffic in the *ISP Remand* Order, the Administrative Law Judge must conclude that the answer is no. The *ISP Remand Order*, its predecessors, and the court decisions reviewing those orders analyze only the situation in which the call is delivered to an ISP located within the originating caller's local calling area. The FCC has concluded that although this type of traffic is not "local" in the sense that it is not subject to § 251(b)'s reciprocal compensation regime, it is a different category of traffic subject to the hybrid compensation regime, intended to minimize the opportunities for regulatory arbitrage, which the FCC developed under its § 201 authority. There is no express reference to VNXX-routed calls, or to the hybrid regime being applicable to calls originated and terminated in different local calling areas, in any of these orders or decisions. Because the parties' agreement incorporates the definition of "ISP-bound traffic" as used in the *ISP Remand Order*, the Administrative Law Judge concludes that the agreement does not require compensation for this type of traffic as a matter of law.

VNXX routing is an issue with tremendous policy and financial implications, not limited to its impact on ISP-bound traffic. It changes one of the fundamental assumptions upon which the Act and most existing regulation of telephone carriers is premised, which is that there is a distinction between local service and long-distance service and that the compensation regimes for the two types of service are different. Today's technology may render these distinctions less meaningful, as Level 3's argument suggests, but the compensation regime has not yet caught up with the technology. The ALJ has difficulty accepting the proposition, advanced by Level 3, that the FCC would have endorsed such a fundamental change in approach without mentioning it at all.[35]

Furthermore, in the *Intercarrier Compensation NRPM* issued simultaneously with the *ISP Remand Order*, the FCC called for comment on the use of VNXX arrangements and their effect on the reciprocal compensation and transport obligations of interconnected LECs. The FCC noted that it had "delegated some of its authority to state public utility commissions in order that they may order the [NANPA] to reclaim NXX codes that are not used in accordance with Central Office Code Assignment Guidelines [COCAG]," and it cited a decision of the Maine Public Utility Commission directing the NANPA to reclaim NXX codes used to provide "unauthorized interexchange service." [36] The ALJ believes it unlikely that the FCC included VNXX traffic in the mandatory, exclusively federal regime established for ISP-bound traffic in the *ISP Remand Order*, while simultaneously acknowledging that state commissions could reject VNXX arrangements as a misuse of numbering resources.

Level 3 argues that the *ISP Remand Order* "expressly repudiated" the local/long-distance distinction for ISP-bound traffic. On the contrary, there is nothing in the order

[35] The FCC has indicated that the issue may be addressed in its *Intercarrier Compensation NRPM. See In the Matter of the Application by Verizon for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia,* FCC 03-57, WC Docket 02-284, Memorandum Opinion and Order at n. 601 (March 19, 2003).
[36] *Intercarrier Compensation NRPM* at ¶ 115.

expressly abolishing this distinction, and the repeated references to local calling areas suggest that the FCC purposely limited the effect of the order to the scenario described.

In addition, Level 3 argues that the Commission already decided, in the previous arbitration between Level 3 and Qwest, that Level 3 may route VNXX calls over LIS trunks. This is essentially the same argument made with respect to the *ISP Remand Order*, which is that by saying nothing about it, the Commission must have included VNXX traffic in its decision. The issue there was simply whether ISP-bound traffic should be included in the relative use factor for apportioning the cost of interconnection facilities. The propriety of VNXX arrangements was not raised as an issue in the arbitration hearing or the Commission's Order.[37]

The only Commission decision concerning VNXX arrangements that any party has pointed to is the Commission's decision in the *AT&T/Qwest Arbitration*, in which AT&T proposed language that would have defined EAS/local traffic based on NPA/NXX code, rather than as traffic that originates and terminates within a local calling area. AT&T's language would have permitted VNXX traffic to be defined as local, subject to reciprocal compensation. Qwest and the other parties to the proceeding opposed this language, arguing that such a practice would undermine the structure of switched access charges and would require payment of terminating compensation for what was not really local traffic. The Commission declined to adopt AT&T's proposed language, based on its concerns that the proposal would impinge upon the operations of other carriers, affect the application of reciprocal compensation and switched access charges, and have unexplored consequences for enhanced 911 service routing, number resource conservation, and local number portability.[38]

The parties have litigated similar issues before other state commissions. To date, the state of Washington has agreed with Level 3, and New Hampshire appears to have concluded that VNXX issues are pre-empted by the FCC[39]; Oregon, Indiana, and Iowa have agreed with Qwest.[40] In addition, two federal courts have addressed the issue, although in different contexts. In *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Company, Inc.*, No. 04-C-1768 (Mar. 25, 2005), the court assumed without discussion that "ISP-bound FX traffic" is permissible; but it is not clear what

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[37] *Level 3/Qwest Arbitration Order.*

[38] *AT&T/Qwest Arbitration Order* at 14.

[39] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and Century Tel of Washington, Inc.*, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, WUTC Docket No. UT-023043 ¶10 (Feb. 28, 2003); *Investigation as to Whether Certain Calls are Local*, Final Order No. 24,080, 2002 N.H. PUC Lexis 165 (October 28, 2002).

[40] *In the Matter of Qwest Corporation vs. Level 3 Communications, LLC, Complaint for Enforcement of Interconnection Agreement*, IC 12 (Aug. 16, 2005), attached as Ex. C to Qwest's Memorandum; *In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp., Complaint for Enforcement of Interconnection Agreement*, No. 05-1219, Order Denying Application for Reconsideration (Nov. 18, 2005), attached as Ex. A to Qwest's Reply Memorandum; *In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934*, Case No. 42663 INT-01, 2004 WL 3140675 (Indiana Util. Reg. Comm'n Dec. 22, 2004) (the FCC did not address traffic bound to an ISP in a different local calling area); *In re Level 3 Communications, LLC v. Qwest Corp.*, Docket No. ARB-05-4 (Ia. Utilities Bd. Dec. 16, 2005) (the Board does not agree with Level 3's assertion that the FCC addressed this issue in the *ISP Remand Order*).

"ISP-bound FX traffic" is, how it was structured, and whether it was the same as what these parties call VNXX traffic. In any event, the case holds only that compensation ordered in Illinois for ISP-bound FX traffic violated the mirroring requirement. In *Southern New England Telephone Co. v. MCI Worldcom*, the court similarly addressed the treatment of ISP-bound FX traffic.[41]

The distinction between ISP-bound FX traffic and VNXX traffic could be important in determining whether some form of termination compensation is due, whether under the reciprocal compensation provisions of § 251(b) or the hybrid regime for ISP traffic. For example, Qwest offers a service called FX, which permits a customer to purchase a connection in the local calling area associated with a telephone number, for which it pays the local exchange rate, as well as a private line transport to wherever its equipment is located. The customer who receives the calls pays for the dedicated transport, not the calling party. Qwest maintains that it requires its ISP customers to use the same arrangement and to pay full retail rates for the private line. Because the private line terminates in the same local calling area as the assigned NPA/NXX, Qwest considers that call to be local.[42] As described by the parties, VNXX routing achieves the functionality of FX service, but no one pays anything (access charges or dedicated transport) for traffic that crosses local calling areas and would otherwise be considered toll traffic. The ALJ cannot assume on this record that VNXX and FX traffic are the same thing.

IV. RECOMMENDED DECISION

Level 3 has moved for summary disposition on Count I of its Complaint, which alleges that Qwest breached its obligation under the ICA to pay reciprocal compensation for ISP-bound traffic. The ICA contains no automatic adjustment for rates resulting from a change in law. Section 2.2 of the ICA provides in relevant part:

> To the extent that the Existing [laws] are changed, vacated, dismissed, stayed or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) days from the effective date of the modification or change of the Existing Rules, it shall be resolved in accordance with the Dispute Resolution Provisions of this Agreement.[43]

In addition, the ICA provides that the Commission must approve any amendment.[44] Thus, the ICA requires the parties to attempt to negotiate an amendment to reflect changes in law, and if those negotiations are unsuccessful, the parties are to bring the dispute to the Commission for resolution of appropriate amendment language.

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[41] 359 F. Supp.2d 229 (D. Conn. 2005).

[42] Rebuttal Testimony of Larry Brotherson at 10-14. Wholesale Dial is a service offered by Qwest's affiliate, QCC, in which private lines are "bundled" and marketed to multiple ISPs. *See* Brotherson Rebuttal at 18.

[43] ICA § 2.2.

[44] ICA § 5.30.1.

The current ICA does not require Qwest to pay reciprocal compensation, or any terminating compensation, for Level 3's ISP-bound traffic. No amendment has been agreed upon or approved by the Commission. If the ICA were amended to reflect the recommendation above, and the Commission approved the amendment, Qwest would be obligated to pay terminating compensation for the portion of Level 3's traffic that does not include VNXX-routed traffic. Because Qwest has no contractual obligation to pay until completion of the change-of-law amendment process, however, the Administrative Law Judge recommends that Level 3's motion for summary disposition on Count I be DENIED, and that Qwest's motion for summary disposition on this claim be GRANTED.

Qwest has moved for summary disposition on Count II of Level 3's Complaint, which alleges that Qwest breached the ICA by failing to negotiate in good faith an amendment to reflect the terms of the *Core Forebearance Order*. In general, issues involving good faith are issues of fact, but Level 3 has not argued that factual issues preclude summary disposition. The record reflects that the parties took and maintained opposing but good-faith positions on a difficult legal issue. Qwest always conceded that it would be obligated to pay terminating compensation on ISP-bound traffic that was not VNXX routed. There is no evidence of bad faith on Qwest's part. The Administrative Law Judge accordingly recommends that Qwest's motion for summary disposition on Count II of Level 3's Complaint be GRANTED.

Qwest also moved for summary disposition on Count III of Level 3's Complaint, which alleges that the failure to pay reciprocal compensation and the failure to negotiate an ICA amendment in good faith constituted discriminatory conduct and failure to interconnect on reasonable terms and conditions in violation of state and federal law. Specifically, Level 3 alleged that this conduct violated Minn. Stat. § 237.121 because a telephone company may not intentionally impair the speed, quality, or efficiency of services, products, or facilities offered to a consumer under a tariff, contract, or price list; or refuse to provide a service, product, or facility to a telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the commission's rules and orders. There is no evidence that Qwest intentionally impaired the speed, quality, or efficiency of any service offered under its contract with Level 3, or that Qwest refused to provide a service, product or facility in accordance with its contract. The Administrative Law Judge recommends that Qwest's motion for summary disposition on Count III of Level 3's Complaint be GRANTED.

Finally, Qwest and Level 3 have moved for summary disposition on Qwest's Counterclaims. In Count 1, Qwest alleged that Level 3 violated the change of law provision in the ICA by billing Qwest for traffic not covered by the *Core Forebearance Order*. The change of law provision cited above requires the parties to attempt to negotiate amendments to reflect changes in law, and if negotiations are unsuccessful, the parties are to invoke the dispute resolution provisions of the ICA and bring the issue to the Commission for resolution. The Administrative Law Judge concludes that Level 3 did violate the ICA by billing Qwest for termination of VNXX-routed ISP traffic before the change-of-law amendment process was completed. There is no evidence, however, that Qwest was damaged by this violation or that the violation was a knowing and intentional one that would subject Level 3 to a penalty order under Minn. Stat. § 237.462. As with Level 3's claim concerning Qwest's alleged failure to negotiate in good faith, the record merely demonstrates that the parties took opposing, good-faith positions on a difficult legal issue. Accordingly, the Administrative Law Judge recommends that the motions of both parties for summary disposition on Count 1 of Qwest's Counterclaim be DENIED.

Count 2 of Qwest's Counterclaim alleges that Level 3 breached its obligation to administer NXX codes and to provide information necessary to maintain the LERG. Count 3 alleges that Level 3 violated the ICA by routing VNXX traffic over LIS trunks. The Department recommends that no determination be made on these claims in this docket, because these issues should be addressed in a docket concerning the validity of VNXX, FX-like, and FX offerings in general.

Section 13.4 of the ICA makes each party responsible for administering the NXX codes assigned to it. It further requires that each party shall provide all required information regarding its network for maintaining the local exchange routing guide (LERG) in a timely manner. The ICA does not expressly prohibit VNXX routing. The COCAG guidelines developed by the North American Industry Numbering Committee generally require that codes allocated to a provider are to be utilized to provide service to a customer's premise physically located in the same rate center to which the codes are assigned; exceptions exist, however, "such as for tariffed services like foreign exchange services."[45] The COCAG makes no specific reference to VNXX traffic, nor do the FCC's rules on numbering administration. This Commission has not addressed the propriety of VNXX arrangements, except in the context of the *AT&T/Qwest Arbitration Order*, in which it decided that local service should not be defined to include it.

On this record the Administrative Judge cannot say that Qwest is entitled to judgment as a matter of law and recommends that Qwest's motion for summary disposition on Count 2 of Qwest's counterclaim be DENIED and that Level 3's motion for summary disposition on this claim be GRANTED.

With regard to Count 3, Qwest argues that VNXX traffic does not fit within the definition of any type of traffic the parties are permitted to exchange under the ICA. Level 3 maintains it may exchange VNXX traffic because it is included in the ICA's definition of "ISP-bound traffic." For the reasons stated above, the ALJ disagrees with this conclusion. No one argues that VNXX is EAS/local traffic, because that is defined as traffic that originates and terminates within the same local calling area.[46] Although Qwest's position on VNXX is that it is really disguised toll traffic, Qwest argues that VNXX is not exchange access either. Exchange access is intraLATA toll, as determined by Qwest's interstate tariffs, and excludes toll provided using switched access purchased by an interexchange carrier.[47] Functionally, ISP-bound VNXX traffic

[45] COCAG § 2.14.
[46] ICA § 4.22.
[47] *Id.*

appears to fit within the definition of exchange access, but there is no compensation mechanism that would permit Qwest to recover access charges for it.

There are, in addition, potential issues of discrimination if the Commission were to grant Qwest's motion. Qwest has its FX service, which is similar but not the same as VNXX routing. Apparently AT&T has a VNXX service of some type, but there is no information in the record as to how this is structured with Qwest, or how similar arrangements with other CLECs may be structured.[48] On this issue, the Administrative Law Judge finds the Department's position persuasive. Even if a hearing were to take place, the parties could not develop an adequate record to address these wide-ranging issues, because there should be an opportunity for other CLECs, ILECs, and other interested parties to provide input. The Administrative Law Judge cannot say that either Qwest or Level 3 is entitled to judgment as a matter of law and accordingly recommends that both motions for summary disposition on Count 3 of Qwest's Counterclaim be DENIED.

Although this is not an arbitration proceeding, both parties and the Department have proposed language to amend the ICA to reflect the *Core Forebearance Order*. The Department recommends using Qwest's proposed language, with a modification. According to the Department's interpretation of Qwest's evidence, Qwest cannot determine whether a call is ultimately "terminated" or delivered to an ISP within a particular local calling area; it can only measure traffic to the point of interconnection with Level 3, and Qwest has no way of determining what Level 3 does with the traffic after it enters the Level 3 network. The Department's proposed language would accordingly define ISP-bound traffic as traffic that is delivered to a point of interconnection with Level 3 that is located within the same Qwest local calling area as the originating caller.[49] This proposal would essentially consider traffic to be "terminated" when it is handed off to Level 3 at a POI that is located within the same local calling area as the originating caller.

The parties have not addressed whether it would be appropriate to modify the contractual language they have proposed in the course of a complaint proceeding, as opposed to an arbitration; nor is it clear to the Administrative Law Judge that Qwest would be obligated to accept the Department's modification of Qwest's proposed language as a recommendation on cross motions for summary disposition. If the Commission accepts the above recommendation that Qwest is not required under the ICA to compensate Level 3 for termination of ISP-bound calls accomplished through VNXX routing, it should order the parties to submit a proposed amendment consistent with the Commission's decision, including the manner in which this traffic will be measured. Any amendment to the ICA should be effective upon the date the Commission approves it, unless the parties agree otherwise.

K.D.S.

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[48] *See, e.g., AT&T/Qwest Arbitration Order* at 14.

[49] Direct Testimony of John Grinager at 15.